IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004HCV01891

BETWEEN NEINAH WILLIAMS CLAIMANT AND
ISLANDWIDE CONCRETE COMPANY LIMITED 1st DEFENDANT

AND HENRY BOWEN 2ND DEFENDANT

WRITTEN REASONS FOR ORAL JUDGMENT HEARD:

March 10, 2017

Ms. Christine Mae Hudson instructed by K. Churchill Neita & Co for the claimant

Mr. Lowel Morgan instructed by Nunes, Scholefield, DeLeon & Co for the first defendant

SIMMONS J

[1] Miss Neinah Williams, the claimant, is now 35 years old. On February 18, 2003 she was travelling as a passenger in a motor vehicle registered 8705 AZ along the Hopewell Main Road in the parish of Hanover. A collision occurred between the 1st defendant"s motor vehicle registered CB 7821 and the motor vehicle in which the claimant was travelling. At that time, the motor vehicle owned by the 1st defendant, Islandwide Concrete Company Limited, was being driven by the 2nd defendant, Mr. Henry Bowen.

[2] Consequently, the claimant initiated proceedings against the 1st defendant and the second defendant whereby she alleged negligence and claimed damages for

the injuries, losses and damage that she has suffered and continues to suffer as a result of the accident. Her amended Particulars of Claim filed on June 30, 2014, indicate that at all material times she was a Bill Collector.

[3] On October 8, 2007 McIntosh J ordered that summary judgment should be entered for the claimant against the 1st defendant to have damages assessed. So now the case falls for assessment of damages before me.

The Assessment

[4] In ***Livingstone v Rawyards Coal Co*** (1880) 5 App. Cas. 25, Lord Blackburn stated the general principle that should guide this Court when assessing damages in tort. He said:

> *"I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong…"*

[5] I will bear this principle in mind when assessing this claim. Additionally, in assessing general damages I will adopt the guidelines formulated by Wooding, C.J in ***Cornilliac v St. Louis*** (1965) 7 WIR 491. I will therefore take the following into account:

(a) The nature and extent of the injuries sustained;

(b) The nature and gravity of the resulting physical disability;

(c) The pain and suffering which had to be endured;

(d) The loss of amenities suffered; and

(e) The extent to which, consequentially, the claimant"s pecuniary prospects have been materially affected.

The nature and extent of the injuries sustained

Report from the Cornwall Regional Hospital (Exhibit 1)

[6] This report dated November 20, 2003, indicates that following the accident, the claimant was taken to the Cornwall Regional Hospital where she was investigated with x-rays of her cervical spine and found to have a fracture of the odontoid process of her cervical vertebrae. On routine examination she was found to have fecal material coming from her vaginal cavity.

Report from the Kingston Public Hospital (Exhibit 2)

[7] This report dated September 10, 2003, indicates that the claimant was transferred to the Kingston Public Hospital on February 21, 2003. This report was predicated on her assessment on August 25, 2003. The claimant"s diagnosis is stated as follows:

> *"Based on her initial injury, investigation and current clinical findings, she has been diagnosed with a resolving incomplete spinal cord injury secondary to a type II odontoid fracture. She has loss of neck movement as a result of her injury and posterior spinal fusion and some residual pain over her bone graft donor site. She also demonstrated urge incontinence of both urine and stool and this is as a result of her cord injury. Her injuries are all consistent with the spinal cord injury that she sustained in the accident"*

[8] On August 25, 2003 her overall combined whole person disability rating was estimated between 76%-86%. It was noted that her disability at that time was expected to improve.

Report from Dr. Grantel Dundas, Consultant Orthopaedic Surgeon (Exhibit 4A)

[9] Dr. Dundas" report, dated March 1, 2004, revealed that the diagnoses entertained were: cervical spinal cord injury with residual (sic), left spastic tetraparesis and urinary and fecal incontinence.

The nature and gravity of the resulting physical disability

Report from Dr. Robert L Wan, Consultant Urologist (Exhibit 5)

[10] In his report dated September 30, 2005, Dr. Wan stated that the claimant was seen on September 14, 2005 for assessment of urinary incontinence. Dr. Wan further stated that there was diminished sensation in the left labium majora and perineum. It was his opinion that the claimant"s urinary problems were as a result of damage to the spinal cord. He assessed her as having fifty percent (50%) impairment of the whole person due to loss of urinary control. Dr. Wan stated that he does not expect further *significant* improvement because of the time that had passed since her accident.

Report from Dr. Grantel Dundas, Consultant Orthopaedic Surgeon (Exhibit 4D)

[11] In his report dated March 10, 2014, Dr. Dundas indicates that he examined the claimant on March 3, 2014. He assessed her range of motion and provided the following measurements:

Flexion- 60°

Extension- 30°

Left side bending- 30°

Right side bending- 25°

Left rotation- 45°

Right rotation- 55°

[12] Dr. Dundas stated that the claimant"s upper extremities demonstrated spasticity more so on the right. He further stated that there was poor functional coordination in her right hand and forearm movements. The claimant"s right
Deltoid was weak (4-/5), her Biceps were also weak (4-/5) and her triceps (4-/5).

Her wrist extensors and flexors were spastic and she had poor fist formation and marked hyper-reflexia. In the lower extremities the claimant had hyper-reflexia with one to two beats of left patella clonus, five to six beats of right ankle clonus and one to two beats of left ankle clonus. The hip abductors were rated a 4+ on a scale of 0-5, quadriceps 4/5, hip abductors 4/5. She walked with a scissors gait and had difficulty getting in and out of a chair.

[13] Dr. Dundas averred that the diagnosis entertained was spastic tetraparaesis. Her impairment was assessed as fifty-five (55%) whole person.

Witness Statement

[14] In the claimant"s witness statement dated September 13, 2007 she stated that as a result of her inability to control her urine and faeces she gets a vaginal infection on a regular basis despite proper hygiene practices. As a result she has to visit the gynaecologist regularly to be treated. (See the report of Dr. Dundas, dated March 10, 2014, particularly the prognosis).

[15] She stated that she cannot run, walk fast and every physical move has to be calculated. She has real difficulty going up and down stairs, sitting down and getting up from a sitting position. She cannot stoop or bend freely without support. She must avoid crowds, due to her slow, shuffling steps and inability to walk fast. She gets tired easily even when she walks short distances and sometimes she feels as though her knees are buckling as if she is going to fall. She cannot wash; she cannot comb her hair or carry heavy objects in her hand. She cannot do normal household chores, like cleaning the house or doing laundry.

The pain and suffering which had to be endured

[16] The aforementioned witness statement conveys the intensity of the pain and suffering of the claimant. Her written evidence indicates that during her journey to the hospital she felt no sensation in her hands and from her belly down to her

feet had no feelings. She was soaked in faeces. At the hospital a tube was placed in her throat and she was placed on the respiratory machine. Skull traction was placed in her head with two pieces of iron at each end.

[17] She averred that she was placed in a neck brace and could not turn her neck to look either side. She had to lay flat on her back without support or elevation. She stated that this was uncomfortable and she was in excruciating pain.

[18] While at the Kingston Public Hospital she slept for two (2) days straight. She stated as follows:

> *"No soon after I woke up, the doctors drilled my skull on both sides and something resembling a catapult was screwed in it and weight of about thirty (30) pounds placed at the end. The drilling process caused so much pain…"*

[19] The claimant informed the Court that while she was at the hospital she was totally helpless and it was the worst period of her life. She had to be in pampers everyday as she had no control over her urine and faeces. She had to be cared for by the nurses and some of them were unkind and impatient. Once, she had to lie in her own faeces for nine (9) hours until she was changed.

[20] She stated that when she started to get sensation in her feet and hands it came in the form of spasms, sharp jerks which she had no control over. The more intense the spasms were the more intense the pains were. Sometimes the spasms in her foot would last for five (5) minutes and after the spasms she felt exhausted.

[21] She left the Kingston Public Hospital and went to Mona Rehab where she would undergo intense physical therapy. At Mona Rehab she observed persons who

were physically challenged and this caused her to become depressed, angry and scared.

[22] At Mona Rehab her strong desire to walk again led to a most tiring experience as it would take her about forty-five (45) minutes to make about five steps due to the spasms. She eventually became strong enough to walk with the assistance of a walker but she remained unable to carry out certain activities such as bathing herself.

[23] Within the first year of her accident she experienced severe burning sensation in her upper limbs and her finger tips and toes would burn her like pepper and nothing gave her relief.

[24] She recounted an embarrassing experience when she decided to go into the town without wearing pampers. She was passing an area where there was a lot of dust, she coughed and passed urine. She then had to explain the ordeal to a man who offered her assistance. She recounted another experience of hot porridge spilling on her and burning her leg due to the occurrence of a spasm.

[25] Her boyfriend broke off their relationship of three years and once when she decided to engage in sexual intercourse not only did she feel no sensation but she urinated on herself and passed faeces. She felt less than a woman.

[26] She has to deal with explaining to people all the time why she walks the way she walks and she finds this depressing. People stare at her when she goes on the road and men say unkind things to her because she cannot turn around to acknowledge their greeting. Any sharp turn to the neck causes a lot of pain and to bend down and hold her neck in a downward position causes a lot of pain and discomfort. She also suffers severe back pains and aches and swelling around the ankles if she sits and stands for even short periods. When she is cold she experiences spasms and terrible pains. (The reports prepared by Dr. Dundas dated June 27, 2005 (exhibit 4B) and May 17, 2006 (exhibit 4C) confirm the claimant"s complaint of spasms).

Report from Dr. Aggrey Irons, Consultant Psychiatrist (Exhibit 6)

[27] In this report dated October 4, 2006, Dr. Irons indicates that he examined the claimant on July 18, 2006. Her mental status examination revealed the following:

(i) Severe tearfulness

(ii) Urinary Incontinence (with bedwetting)

(iii) Frequent flashbacks and nightmares with a „hazy" memory of the time surrounding the event

(iv) Phobic avoidance behaviour

(v) Severely decreased libidinal urges leading to „drastic" sexual problems

(vi) Anxiety and depression with inability to maintain long term concentration

[28] Dr. Irons averred that the above constitute a severe post traumatic stress disorder which has severely altered the claimant"s normal predictable course of development and self esteem.

[29] In Dr. Dundas, final report, dated March 10, 2014 he states as follows:

> *"She will also require psychological counselling to enable her to copy (sic) with the element of depression"*

The loss of amenities suffered

[30] An award for loss of amenity is to compensate the claimant for the loss of quality or reduced enjoyment of life. (See ***Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited*** (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 1061, judgment delivered 27 April, 2007).

[31] In her written evidence the claimant asserted that before the accident life was good she was physically energetic and she would go to the gym. Now, she is not able to wear the clothes she would wear before the accident due to her use of pampers.

She can no longer go to parties and dance or go swimming. She does not really go anywhere as she fears the questions that will be asked.

[32] She also asseverated the following:

> *"It was very painful and difficult to express when I discovered I had little or no vaginal sensation…I still could not bring myself to this state, a life without pleasure…"*

[33] She informed the Court that she cannot prepare food as she cannot hold a knife to peel an orange or peel food. Being in the kitchen is dangerous as she does not know when the spasms will come. The claimant averred that she misses cooking, being able to prepare.

The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected

[34] In ***Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited*** (supra) McDonald-Bishop J (Ag.) declared that the claimant is entitled to an award for any prospective pecuniary losses that are reasonably likely to flow from the injuries sustained.

[35] In this case, the claimant has claimed for loss of earning capacity. In this respect, the case of ***Moeliker v A Reyrolle & Company Ltd*** [1977] 1 All ER 9 is instructive. It is now well established that this head of damage generally arises where a claimant, is at the time of the trial, in employment but there is a risk that he may lose this employment at some time in the future and may then as a result of his injury be at a disadvantage in getting another job or an equally well paid job.

[36] Browne LJ said:

> *"…what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market"*

He continued:

> *"The consideration of this head of damages should be made in two stages 1. Is there a substantial or real risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise) the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises…."*

[37] In the first paragraph of the claimant"s Particulars of Claim it is noted that the claimant was at all material times a Bill Collector. In the first paragraph of her witness statement filed on September 13, 2007 the claimant states that she was previously employed as a Data Entry Operator but she was now unemployed.

[38] The ***Moeliker*** case has engendered some confusion as to whether an award can be made under this head if the claimant is unemployed at the date of the trial. Browne LJ in ***Cook v Consolidated Fisheries Ltd*** [1977] ICR 635 formally clarified the legal position. The case established that the claimant being in employment at the time of the trial is not a prerequisite of the award.

[39] In ***Cook***, the claimant was unemployed at the date of the trial. His accident happened on February 26, 1975 and he was able to resume his work as a deckhand on June 23, 1975. He made four or five trips as a deckhand and finished his last trip at sea on December 23, 1975. He was quite happy as a deckhand but the future of the Icelandic trawlers was very much in doubt so he decided to take on another job driving lorries or vans. He sought qualifications for the work and at the time of the trial in 1976, he was still in the process of qualifying for his new career; but, as soon as he was qualified, he would have obtained work. It was acknowledged that he could have carried on working as a deckhand on the ship and he could earn an equal amount driving lorries. The medical evidence was that whilst he could work, he would, within the next ten
(10) to fifteen (15) years suffer from arthritis as a result of the injury he sustained.

[40] It is therefore not quite difficult to understand the application of the ***Moeliker*** principles to the facts of the case. Though Mr. Cook was unemployed at the time of the trial there existed a great level of certainty that he would find employment. Therefore the risk that he would, at some future time, suffer financial damage because of his disadvantage in the labour market was still an important consideration.

[41] The situation where the claimant is unemployed at the date of the trial with no obvious employment prospects is patently different. However, in ***Icilda Osbourne v George Barned and Ors*** (unreported) Supreme Court, Jamaica, Claim No. 2005 HCV 294, judgment delivered February 17, 2006) Sykes J found that the claimant was entitled to an award for loss of earning capacity. He said:

> *"In the case before me, the evidence is that Miss Osbourne has lost her job because she could no longer carry out the duties and responsibilities of a practical nurse. Her employers told her that that was the reason for not continuing her employment. So the risk materialised within six weeks of the accident…what is clear is that she can no longer work at jobs that require much lifting, bending or sitting. She can no longer work as a practical nurse or even a household helper. She testified that even when she stands for long periods she experiences much discomfort. Miss Osbourne testified that although she has the skills of a seamstress she cannot utilise them because she suffers pain in her neck and back. If she sits up for long periods, she says pain comes along. I am satisfied that Miss Osbourne should receive an award for loss of future earning capacity."*

[42] The learned judge referred to the two stage test formulated by Browne LJ in ***Moeliker*** and stated that it is obvious that framing the issue in this way is predicated on the claimant working at the time of the trial.

[43] In ***Donovan DeSouza v CB Duncan & Associates Ltd and Ors*** (unreported), Supreme Court, Jamaica, Suit No. CL DO96/1998, judgment delivered 18 June 2004, Sykes J made an award for handicap on the labour market in respect of the

claimant"s farm work career. It was established that the claimant was no longer able to go on the farm work programme because of his injury.

[44] In ***Patrick Thompson v Everton Eucal Smith and Ors*** [2013] JMCA Civ 42, Morrison JA mentioned the ***Icilda Osbourne*** case and did not express disapproval of the learned trial judge"s decision to make the award. Therefore, I am of the view that it is appropriate to make an award for loss of future earning capacity[1].

[45] In ***Patrick Thompson*** Morrison JA stated as follows:

> *"Therefore, once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries. Although the claimant"s employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity. This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account."*

[46] In ***Icilda Osbourne*** Sykes J averred that:

> *"The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the claimant has been working for some time before accident so that the court has*

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[1] In ***Anthony Campbell v Level Bottom Farms Ltd & Paul Samuels***, the trial judge found that though the claimant"s situation did not fall within the ***Moeliker*** principles it would be inconsistent with humanity and justice to deny the plaintiff an award for loss of earning capacity.

some reliable data concerning her income, her remaining working life and so on then the multiplier/multiplicand method may be used (Campbell v Whylie (1999) 59 WIR 326).”

[47] The lump sum method of calculating this award was also acknowledged. In ***Icilda Osbourne*** and ***Donovan DeSouza*** the lump sum method was used. However, in ***Donovan Desouza*** Sykes J stated that in deciding which method to use he had to bear in mind that there was also a claim for loss of future earnings and the method of calculating such damages is based upon the multiplier/multiplicand method and it would have yielded virtually the same result as the loss of earning capacity if the same method was used.

[48] Counsel for the claimant intimated that the multiplier/multiplicand approach should be used. She relied on the case of ***Anthony Campbell v Level Bottom Farms Ltd & Paul Samuels*** (unreported) Supreme Court, Jamaica, Suit No. C.L 1994 C 411 judgment delivered 12 February 1998. In this case it was said that the learned trial judge fell into error in using the then minimum wage as the multiplicand; the correct approach was to take the difference between what the claimant earned before he suffered the injury and what he was now able to earn after the disability as the multiplicand. Notably, like the claimant in this case, Mr. Campbell was not employed at the date of the trial. Though Counsel acknowledged that the multiplier had been adjusted, she failed to give due attention to what the Court regarded as the proper approach.

[49] I must also note that though the claimant highlighted her challenges in using the computer, in February 2007, a few years after her accident, she obtained a Certificate in Data Entry and Customer Service. In paragraph 49 of her witness statement she expressed doubt that she would be able to obtain a job which requires typing or using the computer but she obtained a job as a Telemarketing

and Customer Service Agent in April 2007. Her duties involved using the computer to process information, using the telephone and dealing with customers. She stated that she convinced her employers that she could cope despite her condition.

[50] In the report dated May 17, 2006 the claimant‟s impairment was assessed as 83% of the whole person. She got her job at the call centre in 2007. In the report dated March 10, 2014 her impairment was noted to be 55%. Though, without giving details, she has stated that she has been unsuccessful trying to find other employment since leaving her job at the call centre, one can remain hopeful about future employment prospects. After all, she resigned she was not fired.

Quantification of the Award

General Damages

[51] In the Court of Appeal case of ***Derrick Munroe v Gordon Robertson*** [2015] JMCA Civ 38, Sinclair-Haynes JA (Ag) stated the following:

> *"There are established principles and a process to be employed in arriving at awards in personal injury matters. In determining quantum, judges are not entitled to simply "pluck a figure from the air"…Regard must therefore be had to comparable cases in which complainants have suffered similar injuries."*

Award for Pain and Suffering/Loss of Amenities

The Authorities cited

[52] In assessing general damages, Counsel for the claimant relied on the following cases:

(i) ***Lloyd Clarke v Corp E.F Quest & Anors*** (unreported), Supreme Court, Jamaica, Claim No. 2007 HCV 01550, judgment delivered 2 May 2008; and

(ii) ***Norris Francis v UC Russal Alumina Jamaica Limited*** (unreported), Supreme Court, Jamaica, Claim No 2007 HCV 03957, judgment delivered 13 July 2010

[53] In ***Lloyd Clarke***, the claimant was shot in the back and right elbow. The particulars of his personal injuries and resulting disability was noted as follows:

(i) Completely severed spinal cord at T 10 vertebra

(ii) Complete paralysis from navel down

(iii) Gunshot wound to the right elbow with exit right epicondyle

[54] The medical report indicated that the claimant had complete paraplegia below T 10-11 urethral level. He was treated at the Cornwall Regional Hospital between July 24 and August 2, 2006 and thereafter spent forty two (42) days at the Sir John Golding Rehabilitation Centre. The claimant moved around in a wheelchair and was noted to be a dense paraplegic with incontinence at faeces and urine. He had an indwelling catheter in place. The prognosis was that it was unlikely that the claimant would recover and that he would be totally dependent on someone to help with his personal hygiene and that the pressure ulcers would take time to heal. The indwelling catheter would remain for life and it had to be changed at least every six (6) weeks. The claimant was prone to tract infections and his only source of ambulation was a wheelchair which he would need for the rest of his life. The claimant"s whole person disability was evaluated at 65%.

[55] The claimant was awarded twenty six million dollars ($26,000,000.00) for pain and suffering and loss of amenities in December 2008.

[56] The updated award is forty five million two hundred thousand dollars and cents ($45,200,000.00). This figure was arrived at in the manner set out as follows:

Present Index (January 2017) / Index at Award * Award

237.3/136.5*26,000,000=45,200,000.00

[57] In ***Norris Francis*** the claimant claimed damages for personal injuries arising from a motor vehicle accident. The claimant"s injuries were particularised as follows:

(i) Cerebral oedema;

(ii) Brain contusion;

(iii) Rib fracture with pneumohaemothorax;

(iv) Loss of consciousness;

(v) Severe head injury

(vi) Suffering weakness in all limbs

(vii) Spastic quadriparesis (right side weaker than left side)

[58] The medical evidence indicated that the claimant was left with a permanent partial disability **(PPD) of 50%** of the whole person. He was in a coma for about a month. He was eventually able to ambulate using a walker but his gait was unsteady.

[59] The Court was of the view that given the circumstances an award of twelve million dollars ($12,000,000.00) would be appropriate. However, due to the apportionment of liability the claimant was awarded six million dollars ($6,000,000.00) on July 13, 2010.

[60] The updated award is seventeen million six hundred and fifty four thousand six hundred and sixty dollars and seventy fivecents ($17,654,060.75). This figure was arrived at in the manner set out as follows:

Present Index/ Index at Award * Award

237.3/161.3*12,000,000=17,654,060.75

[61] In the case before me the claimant is not completely paralysed from the navel down as was the case in ***Lloyd Clarke***. The claimant in this case can ambulate using a walker; she is not in need of a wheelchair for the rest of her life. It is therefore no surprise that Mr. Clarke"s whole person disability was evaluated at 65% unlike the claimant"s 55% assessment. Furthermore, the claimant in this case

suffered from no pressure ulcers and unlike Mr. Clarke whose catheter would remain for life, the claimant used a urinary catheter for almost three (3) months after her injury[2]. That being said, Mr. Clarke sustained a spinal cord injury, suffered from incontinence and was prone to tract infections just like the claimant in this case.

[62] In ***Norris Francis***, the claimant sustained serious head injuries; not a spinal cord injury. Mr. Francis was in a coma for about a month. The loss of bowel and urinary control is a feature wholly absent in the ***Norris Francis*** case. The case is similar to the case at bar because Mr. Francis suffered weakness in his limbs and was diagnosed as having spastic quadriparesis which like tetraparaesis is partial paralysis[3].

[63] I am of the view that of the two cases cited, the ***Lloyd Clarke*** case is more similar to the case at bar. The report dated September 10, 2003 indicates that the claimant was admitted to the Cornwall Regional Hospital on February 18, 2003 and then transferred to the Kingston Public Hospital on February 21, 2003. It also indicates that on April 20, 2003 she was discharged from the ward with advice to continue her physiotherapy as an outpatient.[4] Curiously the report from

the Sir John Golding Rehabilitation Centre indicates that she was admitted to the Rehabilitation Centre on March 18, 2003 and discharged on June 26, 2003. Despite the discrepancies with dates I think it can safely be said that the claimant in this case spent more time in health care/rehabilitation facilities than Mr. Clarke.

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[2] Dr. Wan"s report dated September 30, 2005 states that the claimant was catheterized for approximately five (5) months

[3] See „Schmidt"s Attorneys" Dictionary of Medicine" by J.E Scmidt, M.D 1986, Volume 4, page 352

[4] The report dated March 1, 2004 indicates that she spent one month in the Kingston Public Hospital

[64] I must also mention that the claimant has been formally assessed as having psychological suffering due to the accident. This factor seems to have been absent in the assessment of ***Lloyd Clarke***. I am of the view the claimant must receive compensation for her mental suffering. Also, the claimant in this case was noted to have diminished sensation in the left labium majora and perineum which would result in significant loss of amenities associated with sexual intercourse.

[65] I am of the view that the sum of x would be an appropriate award for pain and suffering/loss of amenities.

Loss of earning capacity

[66] In the case before me, there is no longer a risk of unemployment as a result of the claimant"s injuries, the risk materialised within a few years after the accident. Her partial paralysis and her incontinence have made it particularly difficult to cope in the work environment. She also experiences discomfort when her surroundings are cold. Though the medical evidence does not state that the claimant cannot work, her tetraparaesis diagnosis and her written evidence concerning the effect of her injuries on her ability to perform her work are in my view sufficient to justify making the award.

[67] The claimant"s witness statement and supplemental witness statement divulged her earnings before and after the accident. However, no documentary proof was submitted to the Court. In my view, this is surprising because her job was not informal in nature. In other words, the claimant was not in the position of the pushcart vendor.[56] No explanation was provided as to why documents in proof of

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[5] In ***Desmond Walters v Carlene Mitchell*** (unreported), Court of Appeal, Jamaica, SCCA 64/91, judgment delivered 2 June 1992, Wolfe J.A (Ag) (as he then was), concluded that one could not expect a sidewalk or a push cart vendor to prove his or her loss of earnings with the mathematical precision of an organized company. [6] *Harrison"s Assessment of Damages: Cases on Personal Injury and Fatal Accident Claims* (2 edn, 6nd), page 36- "Where it is impossible to ascertain what the earning capacity of the victim is, or will be in the future, the Court, may assume that, at least, the claimant (victim) would be able to earn an amount

her earnings were not submitted. Due to the claimant"s failure to strictly prove her earnings, I will use the minimum wage to calculate the award[6]. The figure of six thousand two hundred dollars ($6200.00) will therefore be used.

[68] This figure would have to be multiplied by 52[7] to ascertain a yearly figure. The resulting figure, the multiplicand, is three hundred and twenty two thousand four hundred dollars ($322,400.00).

[69] A suitable multiplier has to be applied to the multiplicand. To ascertain the multiplier one has to subtract the claimant"s age at the date of the trial from the age she is expected to retire. This is done to find out the remaining period of her working life[7].

[70] Having been born on October 17, 1981, the claimant was almost 26 years old at the date of the summary judgment order on October 8, 2007. The retirement age for women is sixty five (65). When 26 is subtracted from 65, 39 is the result, the multiplier. This number should be discounted to take account of the following factors: receipt of earnings lost as a lump sum and the vicissitudes of life (the claimant might have lost her job at some point in the future through redundancy or illness).

[71] I believe that an appropriate multiplier would be 15. Consequently, the mathematical calculation for the claimant"s loss of earning capacity is as follows:

$322,400*15= $4,836,000

Future Help

[72] In her witness statement the claimant states that she continues to depend on friends and family for assistance with domestic chores, such as washing, cleaning,

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equivalent to the national minimum wage. See Douglas v KSAC and Ors (Consolidated) 18 JLR 338" [7] 52 weeks are in 1 year

[7] See ***Lai Wee Lian v Singapore Bus Service*** (1978) Ltd [1984] A.C. 729

ironing and cooking. She also stated that she cannot comb her hair. I accept the evidence that the claimant will need assistance for the rest of her life.

[73] Counsel submitted that the current minimum wage of five thousand six hundred dollars ($5600.00) is reasonable and a multiplier of 17 years is appropriate in the circumstances.

[74] The evidence presented regarding what has been paid to the persons assisting can be found in her supplemental witness statement. The highest sum being five thousand dollars ($5000) per week. I regard Counsel"s proposal of five thousand six hundred ($5600.00) as appropriate. Life expectancy of women in Jamaica is said to be 74 years.[8] Costs of future help are costs which may persist long after someone would have retired. Once the cost is expected to be lifelong then the multiplier should reflect this. I will therefore use the multiplier of 17 as proposed by Counsel.

[75] The calculation for cost of future help is as follows:

$5600*52=$291,200

$291,200*17=$4,950,400

Special Damages

[76] In ***Caribbean Cement Company Limited v Freight Management Limited*** [2016] JMCA Civ 2, Brooks JA said the following:

> *"There is a principle that special damages, such as the damages claimed by FML, must be specifically pleaded and strictly proved. This court has accepted that principle in many cases, including* ***Robinson and Co and Another v Lawrence****. In that case, this court set aside an award of special damages on the basis that the claimant had not proved his claim."*

[8] See World Health Statistics 2012 by the World Health Organisation

[77] The pleadings and the evidence must therefore walk hand in hand. The claimant"s particulars of special damage was admirably detailed. The claimant has claimed: cost of medical reports, cost of medication and gym, transportation costs, cost of extra help, cost of pampers, costs to medical and rehabilitation facilities and pre-trial loss of earnings.

[78] Receipts were tendered in evidence and marked as exhibits 7a to 13c. These exhibits comprise a total of two hundred and forty two thousand seven hundred and eight dollars and fifty nine cents ($242,708.59) and the claimant is entitled to receive compensation for such sums.

[79] Though no documentary proof has been provided for transportation costs, in the Jamaican context, drivers do not usually provide receipts. In respect of this, the judgment of Harris JA in the case of ***Julius Roy v Audrey Jolly*** [2012] JMCA Civ 53 is useful. She stated as follows:

> *"Special damages must be specifically proved - see* ***BonhamCarter v Hyde Park Hotel*** *64 LTR 177. However, this is not an inflexible principle. Although specific proof is required for special damages, there may be situations, depending on the circumstances of the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award: see* ***Attorney General v Tanya Clarke (Nee Tyrell)*** *SCCA No 109/2002 delivered 20 December 2004;* ***Walters v Mitchell*** *(1992) 29 JLR 173;* ***Ashcroft v Curtin*** *[1971] 3 All ER 1208;* ***Grant v Motilal Moonan Ltd & Anor*** *(1988) 43 WIR 372 and* ***Central Soya of Jamaica Ltd v Freeman*** *(1985) 22 JLR 152. In its endeavour to arrive at a reasonable conclusion, the court seeks to satisfy the demands of justice by looking at the circumstances of the particular case: see* ***Ashcroft v Curtin****. Therefore, to demand strict adherence to the principle laid down in* ***Bonham-Carter*** *may cause some injustice to a claimant who had legitimately suffered damage."*

[80] I therefore accept that the claimant having sustained serious injuries required treatment which necessitated her travelling to the hospital and to doctors on several occasions. The evidence regarding her transportation costs as stated in her supplemental witness statement is accepted; I do not regard the cost as too excessive. I award sixteen thousand five hundred dollars ($16,500.00) as claimed.

[81] Regarding the costs associated with the purchasing of pampers, I must point out that the claimant did not submit any receipts as proof of expenditure. However, bearing in mind Dr. Wan"s assessment of impairment due to loss of urinary control, I am minded to accept the evidence given in the claimant"s supplemental witness statement concerning her need for such an item and I will make the award.

[82] At this juncture however, it is important to point out that in respect of this item the claimant has framed her particulars by using the phrase "and continuing". In ***Machel Nugent v Sgt. Paul Gammon and Ors*** (unreported), Supreme Court, Jamaica, Claim No. 2009 HCV 02888, judgment delivered 4 November 2016, Lindo J stated as follows:

> *"I note that in the particulars of claim, the claimant has added "and continuing" in respect of claims for cost of medication, cost of household help, cost of treatment, cost of transportation and for loss of earnings.*
>
> *In **Thomas v Arscott & Anor** (1986) 23 JLR 144 where the Court of Appeal reduced the damages awarded from the amount proven to the amount pleaded, Rowe P at page 151 I –152 A said:*
>
> > *"In my opinion special damages must both be pleaded and proved. The addition of the term „and continuing" in a claim for loss of earnings etc is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum"*

There has been no further amendment to the particulars of claim and no application has been made for the pleadings to be amended, so in applying the above principle, the sum allowed for medication and medical treatment is $131,547.95, as pleaded."

[83] The assessment of damages hearing was held on March 17, 2015 but no evidence was led which established the extra amount of the claimant"s claim. I will therefore award the sum of nine hundred and seventy seven thousand two hundred dollars ($977, 200.00) as pleaded.

Loss of earnings

[84] The claimant has claimed $2,170,300.00 for loss of earnings for two periods. They are:-

1. February 24, 2003 – April 30, 2007 (215 weeks @ $7,000.00 per week); and

2. July 2, 2007 – June 20, 2014 (363 weeks @ $5,000.00 per week)

[85] Due to the absence of documentary proof regarding the claimant"s earnings I will use the minimum wage for the different periods that she was not working to calculate her pre-trial loss of earnings. The breakdown is as follows:-

First period

PERIOD	**RATE**	**NO. OF WEEKS**	**TOTAL**
24.2.23-31.10.03	1,800.00	35 + 4 days (36)	64,800.00
1.11.03 – 31.1.05	2,000.00	65 + 2 days	130,000.00
1.2.05 – 31.1.06	2,400.00	51 + 6 days (52)	124,800.00
1.2.06 – 31.1.07	2,800.00	51 + 5 days (52)	145,600.00

1.2.07 – 30.4.07	3,200.00	12 + 4 days (13)	41,600.00
2.7.07 – 29.1.08	3,200.00	30 + 1 day	96,000.00
1.2.08 – 10.5.09	3,700.00	66 + 2 days	244,200.00
11.5.09 – 28.2.11	4,070.00	94	382,580.00
1.3.11 – 3.9.12	4,500.00	78 + 6 (79)	355,500.00
4.9.12 – 20.6.14	5,000.00	93 + 3	465,000.00
TOTAL			**2,050,080.00**

[86] I award two million fifty thousand and eighty dollars ($2,050,080.00).

[87] I also accept the claimant‟s evidence that she required assistance as a result of the injuries she sustained. I will also award the sum of two million one hundred and seventy thousand three hundred dollars ($2,170,300.00) as pleaded.

CONCLUSION

[88] My award is as follows:

(a) General damages

(i) Pain, suffering and loss of amenities- 35,000,000.00 plus interest at the rate of 6% interest from October 1, 2004 to June 21, 2006 and 3% from June 22, 2006 to the date of judgment

(ii) Loss of earning capacity- $4,836,000- no interest

(iii) Cost of future help-$4,950,400- no interest

(b) Special damages

(i) Receipts- $242,708.59

(ii) Transportation costs- $16,500.00

(iii) Costs of pampers- $977, 200.00

(iv) Pre-trial loss of earnings $2,050,080.00

(v) Cost of extra future help- $2,170,300.00

(vi) The total special damages of $5,456,788.51 attract interest at the rate of 6% from February 18, 2003 to June 21, 2006 and 3% from June 22, 2006 to the date of judgment

[89] Costs to the claimant to be agreed or taxed.